

1 DANIEL M. PETROCELLI (S.B. #97802)  
dpetrocelli@omm.com  
2 MOLLY M. LENS (S.B. #283867)  
mlens@omm.com  
3 CAMERON H. BISCAY (S.B. #266786)  
cbiscay@omm.com  
4 O'MELVENY & MYERS LLP  
1999 Avenue of the Stars, 7th Floor  
5 Los Angeles, California 90067-6035  
Telephone: (310) 553-6700  
6 Facsimile: (310) 246-6779

7 Attorneys for Twentieth Century Fox  
Television, a division of Twentieth Century  
8 Fox Film Corporation, and Fox  
Broadcasting Company  
9

10 **UNITED STATES DISTRICT COURT**  
11 **CENTRAL DISTRICT OF CALIFORNIA**  
12 **WESTERN DIVISION**

13 TWENTIETH CENTURY FOX  
14 TELEVISION, a division of  
TWENTIETH CENTURY FOX FILM  
15 CORPORATION, a Delaware company,  
et al.,

16 Plaintiffs,

17 v.

18 EMPIRE DISTRIBUTION, INC., a  
19 California corporation,

20 Defendant.  
21

22 And related counterclaims  
23  
24  
25  
26  
27  
28

Case No. 2:15-cv-02158 PA(FFMx)

**DECLARATION OF MOLLY M.  
LENS IN SUPPORT OF FOX'S  
REPLY IN SUPPORT OF  
MOTION FOR SUMMARY  
JUDGMENT**

**Judge:** Hon. Percy Anderson

**Hearing Date:** February 1, 2016

**Time:** 1:30 p.m.

**Place:** Courtroom 15

**TABLE OF CONTENTS**

<b><u>Title</u></b>	<b><u>Page</u></b>
<b>Lens Declaration .....</b>	<b>1</b>
<b>Exhibit 21: Ms. Lens Nov. 18 Email to Mr. Villar .....</b>	<b>4</b>
<b>Exhibit 22: Ms. Lens Nov. 25 Email to Mr. Villar .....</b>	<b>5</b>
<b>Exhibit 23: Mr. Villar Nov. 30 Email to Ms. Lens .....</b>	<b>9</b>
<b>Exhibit 24: Joint Stipulation Regarding Motion Cut-Off Date.....</b>	<b>11</b>
<b>Exhibit 25: Mr. Villar Dec. 9 Email to Ms. Lens.....</b>	<b>15</b>
<b>Exhibit 26: Mr. Johnson Deposition Transcript.....</b>	<b>16</b>
<b>Exhibit 27: Dr. Jay Deposition Transcript .....</b>	<b>21</b>
<b>Exhibit 28: USPTO Suspension Notice (86590365) .....</b>	<b>30</b>
<b>Exhibit 29: USPTO Suspension Notice (86590402) .....</b>	<b>37</b>
<b>Exhibit 30: USPTO Suspension Notice (86476822) .....</b>	<b>45</b>
<b>Exhibit 31: Mr. Etminan Deposition Transcript .....</b>	<b>51</b>
<b>Exhibit 32: Mr. Shami Deposition Transcript.....</b>	<b>57</b>
<b>Exhibit 33: Exhibit 80 to Mr. Shami Deposition Transcript.....</b>	<b>71</b>

1 I, Molly M. Lens, the undersigned, hereby declare:

2 1. I am a member in good standing of the State Bar of California, an  
3 attorney in the law firm of O'Melveny & Myers LLP, and counsel for plaintiffs and  
4 counterclaim defendants Twentieth Century Fox Television, a division of Twentieth  
5 Century Fox Film Corporation, and Fox Broadcasting Company (collectively,  
6 "Fox"). I submit this declaration in support of Fox's Reply In Support Of Motion  
7 For Summary Judgment. I have personal knowledge of the facts set forth herein  
8 and, if called to testify, could and would testify competently thereto.

9 2. On November 18, 2015, I sent an email to Mr. Villar proposing that  
10 the parties complete their productions of documents by December 3, 2015. This  
11 communication represented the first time either party proposed a date for the  
12 production of documents in response to the parties' requests for production. A true  
13 and correct copy of my November 18, 2015 email to Mr. Villar is attached hereto as  
14 **Exhibit 21**.

15 3. On November 25, 2015, I sent an email to Mr. Villar pointing out that  
16 defendant had not responded to my proposal that the parties complete their  
17 productions in early December. A true and correct copy of my November 25, 2015  
18 email to Mr. Villar is attached hereto as **Exhibit 22**.

19 4. On November 30, 2015, Mr. Villar finally responded to my proposal,  
20 stating that defendant was prepared to exchange documents on December 3, 2015,  
21 as proposed in my November 18, 2015 email. A true and correct copy of Mr.  
22 Villar's November 30, 2015 email is attached hereto as **Exhibit 23**.

23 5. The parties ultimately exchanged document productions on December  
24 4, 2015, though Fox had produced some documents in November and both parties  
25 have since made supplemental productions.

1           6.     On December 8, 2015, the parties filed a joint stipulation regarding the  
2 summary judgment briefing schedule with the Court. A true and correct copy of  
3 this December 8, 2015 stipulation is attached hereto as **Exhibit 24**.

4           7.     On December 9, 2015, Mr. Villar sent me an email identifying  
5 “priority” depositions for defendant. Mr. Villar identified Fox’s 30(b)(6) witness,  
6 Geoff Bywater, and Shannon Ryan as its “priority” depositions. A true and correct  
7 copy of Mr. Villar’s December 9, 2015 email is attached hereto as **Exhibit 25**.

8           8.     Defendant took the deposition of Geoff Bywater on December 22,  
9 2015 (both in his percipient capacity and as Fox’s 30(b)(6) witness on several  
10 topics), the deposition of Fox’s expert Phil Johnson on December 29, 2015 and the  
11 deposition of Fox’s expert Deborah Jay on December 30, 2015. True and correct  
12 copies of excerpts of the transcripts of the depositions of Mr. Johnson and Dr. Jay  
13 are attached hereto as **Exhibits 26 and 27**, respectively.

14           9.     On information and belief, Fox was closed for the holidays from  
15 December 24, 2015 to January 4, 2016.

16           10.    On January 12, 2016, under my supervision and direction, Farrah  
17 Reynolds, a staff attorney in the Intellectual Property & Technology Group at  
18 O’Melveny & Myers, conducted an online search of the USPTO database for  
19 applications filed by defendant to register trademarks that contain the word  
20 “empire.”

21           11.    Defendant has three trademark applications that the USPTO has  
22 suspended. The application for “EMPIRE” with Serial No. 86590365 was  
23 suspended on July 17, 2015; the application for “EMPIRE” with Serial No.  
24 86590402 was suspended on July 17, 2015; and the application for “EMPIRE  
25 DISTRIBUTION” with Serial No. 86476822 was suspended on October 19, 2015.  
26 True and correct copies of the USPTO Suspension Notices are attached hereto as  
27 **Exhibits 28-30**.

1           12. On January 14, 2016, I took the deposition of Nima Etminan,  
2 defendant's Vice President of Operations. A true and correct copy of excerpts of  
3 Mr. Etminan's deposition transcript is attached hereto as **Exhibit 31**.

4           13. On January 15, 2016, I took the deposition of Ghazi Shami,  
5 defendant's Chief Executive Officer. A true and correct copy of excerpts of Mr.  
6 Shami's rough deposition transcript is attached hereto as **Exhibit 32**. A true and  
7 correct copy of the document referenced as "Exhibit 80" in the rough deposition  
8 transcript of Ghazi Shami is attached hereto as **Exhibit 33**.

9           14. Prior to filing its opposition brief, defendant never indicated to Fox  
10 that it was pursuing a reverse confusion claim.

11  
12           I declare under penalty of perjury that the foregoing is true and correct.  
13 Executed on January 15, 2016, at San Francisco, California.

14  
15   
16 \_\_\_\_\_  
17 Molly M. Lens  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

# **EXHIBIT 21**

## Volpe, Stephen

---

**From:** Lens, Molly  
**Sent:** Wednesday, November 18, 2015 5:17 PM  
**To:** Villar, Peter N.  
**Cc:** Bowler, John M.; Gale, Paul L.; lindsay.henner@troutmansanders.com; Petrocelli, Daniel; Biscay, Cameron H.  
**Subject:** Fox v. Empire Distribution

**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

Peter -

During the parties' meet and confer discussions in October, we agreed that the parties would find a future time to discuss the timing of productions and privilege logs. We are writing to continue those discussions. Fox is prepared to make its first production provided that Empire Distribution agrees to make its production on the same date. We further propose that the parties agree to complete their productions by December 3 (for documents otherwise due by this date) and provide privilege logs on that same date for all withheld documents. (For the avoidance of doubt, we do not agree to the November 4 counterproposal by Empire Distribution with respect to the logging of documents).

Molly

---

**Molly M. Lens**  
**O'Melveny & Myers LLP**  
1999 Avenue of the Stars  
Los Angeles, CA 90067  
Phone: (310) 246-8593  
Fax: (310) 246-6779  
[mlens@omm.com](mailto:mlens@omm.com)

*This message and any attached documents contain information from the law firm of O'Melveny & Myers LLP that may be confidential and/or privileged. If you are not the intended recipient, you may not read, copy, distribute, or use this information. If you have received this transmission in error, please notify the sender immediately by reply e-mail and then delete this message.*

# **EXHIBIT 22**



**Volpe, Stephen**

---

**From:** Lens, Molly  
**Sent:** Wednesday, November 25, 2015 5:35 PM  
**To:** Villar, Peter N.  
**Cc:** Gale, Paul L.; Bowler, John M.; Henner, Lindsay Mitchell; Petrocelli, Daniel; Biscay, Cameron H.; Ehlers, J. Hardy  
**Subject:** RE: Fox v. Empire Distribution

**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

Peter -

Your email evidences that you are operating under a fundamental misconception. We have not “created” any scheduling problems. Nor are we giving you an “ultimatum;” we are just presenting facts. We reached out to you in a good faith attempt to meet and confer about the schedule, under the confines of the scheduling order, which you’ve known about for months. The reality is that the last day for a summary judgment motion to be heard is February 1. With the minimum notice period, this means that a motion can be filed no later than January 4. Thus, we are not “insisting on proceeding with [our motion] under the current schedule before the discovery deadline” but must do so, absent an extension of the summary judgment deadline. Further, giving Empire Distribution additional time to oppose our motion necessarily means that you will be opposing our motion over the holidays. (And we cannot help but observe that your complaints about briefing motions over the holiday are especially disingenuous given that you chose to serve us with a joint stipulation right before Thanksgiving and tried, contrary to the rules, to make us respond to the motion on the day after Thanksgiving.)

There is no reason to recite Judge Anderson’s scheduling order to us. Consistent with that scheduling order, we reached out to you, weeks before we were required to do so, to discuss a schedule for our motion for summary judgment. (Since you have ignored our question, we presume that Empire Distribution does not intend to move for summary judgment). Our efforts were met with complaints and accusations.

We are amenable to discussing a potential extension of the entire schedule, including trial, as you propose below. In the meantime, however, we need to proceed on a parallel track under the existing schedule. Given the February 1 hearing date, we propose the following schedule: we file our motion on December 22, you oppose the motion on January 6, and we submit our reply on January 15 (given the MLK holiday this is the last day to submit the reply). Including the two holidays and weekends, that gives you 15 days to oppose our motion (as compared to the statutory 7) and us nine days to submit our reply (as opposed to the statutory 7). This schedule presumes two things: (1) that you would be willing to exchange expert rebuttal reports on December 18 rather than on December 21; and (2) that Judge Anderson would be willing to allow us to move more than 35 days in advance of the hearing date. To the extent that you want to try to work something out, rather than make complaints, we encourage you to reconsider your refusal to speak with us until the end of next week, when it may be too late as a practical matter to submit a stipulation to Judge Anderson.

We will close by noting that your complaints about the state of discovery are equally misguided. You complain that Fox has not produced any documents but neither has Empire Distribution. In fact, you have not even bothered to respond to our proposal that the parties complete their productions, with respect to the documents that the parties have agreed to provide, on December 4. Similarly, you complain that Fox has not responded to any requests for admission or interrogatories when you know well that, given Empire Distribution’s delay in serving discovery, no responses have been due from Fox. And we cannot fathom what the basis is for your threat as to additional discovery motions against Fox, given that you have identified no discovery disputes not covered in your pending joint stipulation.

Molly

---

**Molly M. Lens**  
**O'Melveny & Myers LLP**  
1999 Avenue of the Stars  
Los Angeles, CA 90067  
Phone: (310) 246-8593  
Fax: (310) 246-6779  
[mlens@omm.com](mailto:mlens@omm.com)

*This message and any attached documents contain information from the law firm of O'Melveny & Myers LLP that may be confidential and/or privileged. If you are not the intended recipient, you may not read, copy, distribute, or use this information. If you have received this transmission in error, please notify the sender immediately by reply e-mail and then delete this message.*

---

**From:** Villar, Peter N. [<mailto:Peter.Villar@troutmansanders.com>]

**Sent:** Tuesday, November 24, 2015 10:36 AM

**To:** Lens, Molly

**Cc:** Gale, Paul L.; Bowler, John M.; Henner, Lindsay Mitchell; Petrocelli, Daniel; Biscay, Cameron H.; Ehlers, J. Hardy

**Subject:** RE: Fox v. Empire Distribution

Molly –

The timing and substance of your email regarding your contemplated summary judgment motions is troublesome. You indicated during our Rule 26(f) conference and in the Rule 26(f) Joint Report, five months ago, that Fox intended to file an “early” motion for summary judgment on First Amendment grounds. That did not happen and, instead, you plan to wait to file multiple motions for summary judgment “shortly before the holidays, with [our] oppositions falling over the Christmas/New Year holidays.” In an attempt to resolve this scheduling problem you created, you have given us an ultimatum – either agree to an extension of the summary judgment deadline or spend our holidays responding to your multiple motions on minimal notice. We do not believe your approach is reasonable, appropriate or consistent with Judge Anderson’s Scheduling Order.

Judge Anderson’s Scheduling Order states that “[i]n virtually every case, the Court expects that the moving party will provide more than the minimum twenty-eight (28) day notice for such motions”. It further states “the Court expects that more than the minimum notice will be provided to counsel opposing motion for summary judgment” and that “the parties should confer and agree on the date for setting such motions.” Your proposal to extend the summary judgment hearing deadline with a February 29 hearing date does not resolve the problem of insufficient notice. I believe your proposed briefing schedule would provide us an additional two days over the weekend to respond to your motions beyond the minimum 28-day notice period. Moreover, there is no guarantee that your proposal would “allow the parties to complete discovery prior to summary judgment briefing.” To date, neither Fox nor any of the third party witnesses you represent has produced a single document, responded to a single request for admission or interrogatory, or provided us a single deposition date. We have already served one discovery motion that will likely not be decided until January and we likely will be filing several more if we cannot obtain the discovery we have requested. Therefore, it is very likely that we will be receiving relevant discovery pursuant to court orders after the discovery cut-off deadline and we will almost certainly not have all key deposition transcripts prior to early February given that we have yet to receive a deposition date.

If you are serious about setting a briefing schedule and hearing date that provides the parties sufficient time to complete discovery and adequately brief the issues, we would be open to discussing a stipulation for a brief continuance of the trial date and all case deadlines including a reasonable summary judgment briefing schedule. Otherwise, if you insist with proceeding with your motions under the current schedule before the discovery deadline, we expect that you will confer in good faith to set a mutually convenient date for the hearing and provide us substantially more than the minimum notice period (taking into account the holidays) in accordance with the Court’s Scheduling Order. We, of course, reserve our right to oppose the motions on Rule 56(d) grounds particularly if your clients (parties and third parties) have not provided us all of the discovery on First Amendment and other issues that has been requested.

We are happy to discuss these issues with you further during the L.R. 7-3 conference in addition to any substantive issues relating to your contemplated motions. We are not available later this week in light of the Thanksgiving holiday, but can be available next Wednesday (December 2 early afternoon) or Friday (December 4 morning).

- Peter

---

**From:** Lens, Molly [<mailto:mlens@omm.com>]

**Sent:** Monday, November 23, 2015 8:54 AM

**To:** Villar, Peter N.

**Cc:** Gale, Paul L.; Bowler, John M.; Henner, Lindsay Mitchell; Petrocelli, Daniel; Biscay, Cameron H.; Ehlers, J. Hardy

**Subject:** Fox v. Empire Distribution

Peter -

We write to meet and confer in advance of our contemplated motion for summary judgment. We intend to move for summary judgment on all claims based on the dispositive First Amendment defense; the lack of likelihood of confusion; and the lack of famousness of Empire Distribution's alleged marks. Pursuant to L.R. 7.3, please let us know when you are available to meet and confer. When you respond, please let us know if you anticipate moving for summary judgment on any claims.

With respect to the schedule, as you should be aware, Judge Anderson's scheduling order provides that the current deadline for summary judgment hearings is February 1. The scheduling order separately encourages the moving party to provide more than the minimum twenty-eight (28) day notice for such motions. This means, under the current schedule, summary judgment motion(s) will be filed prior to the completion of discovery. Further, the motions themselves will likely be filed shortly before the holidays, with oppositions falling over the Christmas/New Year holidays.

In light of this, we propose the parties stipulate to an extension of the summary judgment hearing deadline to February 29 (leaving all other case deadlines in place). This would allow the parties to complete discovery prior to summary judgment briefing and, of lesser importance, avoid any holiday conflicts. While the parties can meet and confer to discuss the specific schedule, we propose the following, working backwards from the February 29 hearing date: January 25: deadline to move for summary judgment, contemporaneous with the close of discovery; February 4: opposition date; February 12: reply date (given the holiday of February 15).

To the extent your client is not willing to agree that the parties should jointly request that Judge Anderson move the hearing to February 29, we ask that Empire Distribution stipulate that it will not oppose our forthcoming summary judgment motion on 56(d) grounds.

We ask for your response by 10:00 am tomorrow, which will allow the parties to present any agreement to Judge Anderson for his consideration on Wednesday before the Thanksgiving holiday.

Molly

---

**Molly M. Lens**

**O'Melveny & Myers LLP**

1999 Avenue of the Stars

Los Angeles, CA 90067

Phone: (310) 246-8593

Fax: (310) 246-6779

[mlens@omm.com](mailto:mlens@omm.com)

*This message and any attached documents contain information from the law firm of O'Melveny & Myers LLP that may be confidential and/or privileged. If you are not the intended recipient, you may not read, copy, distribute, or use this*

*information. If you have received this transmission in error, please notify the sender immediately by reply e-mail and then delete this message.*

---

This e-mail communication (including any attachments) may contain legally privileged and confidential information intended solely for the use of the intended recipient. If you are not the intended recipient, you should immediately stop reading this message and delete it from your system. Any unauthorized reading, distribution, copying or other use of this communication (or its attachments) is strictly prohibited.

# **EXHIBIT 23**

**Volpe, Stephen**

---

**From:** Villar, Peter N. <Peter.Villar@troutmansanders.com>  
**Sent:** Monday, November 30, 2015 5:14 PM  
**To:** Lens, Molly  
**Cc:** Bowler, John M.; Gale, Paul L.; Henner, Lindsay Mitchell; Petrocelli, Daniel; Biscay, Cameron H.  
**Subject:** Empire

Molly: I write to follow up on various outstanding issues that we have been discussing over the past few weeks:

First, with respect to the parties' document productions, we are prepared to exchange documents on December 3, as proposed in your November 18 email. We cannot confirm that we will be able to "complete" our production by that date but expect to be producing a substantial volume of documents by that date. We hope to also exchange privilege logs on or about that date, but before we do so we need to further discuss your position regarding the content of the logs since you indicated you did not agree to our November 4 counterproposal.

Second, we have spoken to our client and are willing to agree to your proposal set forth in your November 24 email regarding production of documents responsive to Fox's Requests No. 59 and 68 and Empire Distribution's Request No. 15. We are able to exchange such documents by December 9 as you proposed. We assume our agreement moots your and our Joint Stipulations on these issues.

Third, we are willing to agree to your proposal regarding Messrs. Daniels and Strong subpoena responses as set forth in your November 25 email. I believe that resolves those issues.

Fourth, with respect to your contemplated summary judgment motions, we do not agree to the proposed briefing schedule set forth in your November 25 email (i.e., that you file your motions on December 22, we file our opposition briefs by January 6, and you file your replies by January 15). We do not believe that 14 days in between the Christmas and New Year's holidays is fair or reasonable to respond to multiple motions for summary judgment. We would be willing to agree to the same schedule (we file oppositions on January 6 and you reply on January 15) provided you file your motions by December 7. While that still would be a tight schedule under the above circumstances, it would at least give us 30 days (including weekends and holidays) to respond to your motions. (Since it would not resolve the discovery issues, we would of course reserve our right to raise arguments under Rule 56(d)). As discussed, if we can agree on a continuance of the case deadlines (including a summary judgment briefing schedule) we can likely avoid the scheduling issues. I have a very busy schedule this week but can make some time tomorrow morning around 10 a.m. (in addition to the other dates/times previously mentioned) to discuss a joint stipulation to continue the case deadlines if that works for you.

Regards,

Peter

Peter N. Villar  
Troutman Sanders LLP  
5 Park Plaza  
Suite 1400  
Irvine, CA 92614-2545  
Tel: 949-622-2783

Fax: 949-622-2739

Email: [peter.villar@troutmansanders.com](mailto:peter.villar@troutmansanders.com)

---

This e-mail communication (including any attachments) may contain legally privileged and confidential information intended solely for the use of the intended recipient. If you are not the intended recipient, you should immediately stop reading this message and delete it from your system. Any unauthorized reading, distribution, copying or other use of this communication (or its attachments) is strictly prohibited.

# **EXHIBIT 24**



DANIEL M. PETROCELLI (S.B. #97802)  
 dpetrocelli@omm.com  
 MOLLY M. LENS (S.B. #283867)  
 mlens@omm.com  
 CAMERON H. BISCAY (S.B. # 266786)  
 cbiscay@omm.com  
 O'MELVENY & MYERS LLP  
 1999 Avenue of the Stars, 7th Floor  
 Los Angeles, California 90067-6035  
 Telephone: (310) 553-6700  
 Facsimile: (310) 246-6779

Attorneys for Twentieth Century Fox  
 Television, a division of Twentieth Century  
 Fox Film Corporation, and Fox  
 Broadcasting Company

PAUL L. GALE (S.B. # 065873)  
 paul.gale@troutmansanders.com  
 PETER N. VILLAR (S.B. #204038)  
 peter.villar@troutmansanders.com  
 TROUTMAN SANDERS LLP  
 5 Park Plaza, Suite 1400  
 Irvine, California 92616-2545  
 Telephone: (949) 622-2704  
 Facsimile: (949) 769-2052

Attorneys for Empire Distribution, Inc.

**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA**

TWENTIETH CENTURY FOX  
 TELEVISION, a division of  
 TWENTIETH CENTURY FOX FILM  
 CORPORATION, a Delaware company,  
 and FOX BROADCASTING  
 COMPANY, a Delaware corporation,

Plaintiffs,

v.

EMPIRE DISTRIBUTION, INC., a  
 California corporation,

Defendant.

And related counterclaims

Case No. 2:15-cv-02158 PA(FFMx)

Hon. Percy Anderson

**JOINT STIPULATION  
 REGARDING MOTION CUT-  
 OFF DATE; LENS  
 DECLARATION IN SUPPORT OF  
 JOINT STIPULATION;  
 [PROPOSED] ORDER**

Discovery Cut-off: 1/25/2016  
 Motion Cut-off: 2/1/2016  
 Pretrial Conference: 3/4/2016  
 Trial: 4/5/2016

1 The parties to this action, Plaintiffs and Counterclaim Defendants Twentieth  
2 Century Fox Television, a division of Twentieth Century Fox Film Corporation,  
3 and Fox Broadcasting Company (collectively, “Fox”) and Defendant and  
4 Counterclaimant Empire Distribution, Inc. (“Empire Distribution” and together  
5 with Fox, “the Parties”), respectfully request that the Court approve the following  
6 approximate one-month extension of the summary judgment motion cut-off date  
7 and briefing schedule in accordance with the Court’s Scheduling Order entered July  
8 23, 2015.

9 WHEREAS the Court’s Scheduling Order in the above-captioned matter  
10 provides that summary judgment motions must be heard on or before February 1,  
11 2016, *see* Dkt. No. 23 at 1;

12 WHEREAS, the Court’s Scheduling Order provides that rebuttal expert  
13 reports are due on December 21, 2015, *see id.* at ¶ 1;

14 WHEREAS the Court’s Scheduling Order provides that discovery must  
15 conclude by January 25, 2016, *see id.* at 1;

16 WHEREAS the Court’s Scheduling Order provides that, “in the usual case,  
17 the Court expects that more than the minimum notice will be provided to counsel  
18 opposing motions for summary judgment,” *see id.* at ¶ 3;

19 WHEREAS the Court’s Scheduling Order provides that, “[i]n virtually every  
20 case, the Court expects that the moving party will provide more than the minimum  
21 twenty-eight (28) day notice for such motions,” *see id.* at ¶ 5(d);

22 WHEREAS the Court’s Standing Order provides that “no motion shall be  
23 noticed for hearing more than thirty-five days after service of the motion unless  
24 ordered by the Court,” *see* Dkt. 10 at ¶ 6(a);

25 WHEREAS, on November 23, Fox asserted its intent to move for summary  
26 judgment (“Motion”) on all claims and counterclaims in the above-captioned case  
27 and requested a Local Rule 7-3 conference on its anticipated Motion;  
28

1 WHEREAS Empire Distribution has asserted its intent to oppose Fox's  
2 Motion on the grounds, *inter alia*, under Federal Rule of Civil Procedure 56(d) that  
3 it cannot—prior to the close of discovery—present facts essential to justify its  
4 opposition;

5 WHEREAS the Parties have met and conferred concerning the schedule for  
6 Fox's anticipated Motion, including the briefing schedule and the hearing date for  
7 the Motion;

8 WHEREAS there have not been any prior requests for extensions or  
9 continuances in this matter;

10 NOW, THEREFORE, IT IS HEREBY STIPULATED BY AND AMONG  
11 THE PARTIES HERETO AND THEIR COUNSEL OF RECORD THAT to allow  
12 for the completion of discovery, including expert discovery, and to streamline the  
13 issues presented by the Motion to the Court, the Parties respectfully request that the  
14 motion cut-off date be continued to allow the Motion be heard on March 4, 2016  
15 (the date of the Final Pretrial Conference under the Court's Scheduling Order), and  
16 that the Parties brief the Motion as follows: Fox shall file its Motion by January 22,  
17 2016 (essentially contemporaneous with the close of discovery); Empire  
18 Distribution shall file its Opposition by February 10, 2016, and Fox shall file its  
19 Reply by February 19, 2016.

20 In the alternative, in the event that the Court does not grant the Parties' joint  
21 request to continue the hearing date for the Motion, the Parties have agreed to the  
22 following briefing schedule for the Motion: Fox shall file its Motion by December  
23 15, 2015; Empire Distribution shall file its Opposition by January 6, 2016; and Fox  
24 shall file its Reply by January 15, 2016.

25 In the event that the Court rejects both proposals, Fox will move for  
26 summary judgment on or about December 28, 2015, consistent with the Standing  
27 Order, *see* Dkt. No. 10.  
28

1 Dated: December 8, 2015 Respectfully submitted,  
2 DANIEL M. PETROCELLI  
3 MOLLY M. LENS  
4 O'MELVENY & MYERS LLP

5 By: /s/ Molly M. Lens  
6 Molly M. Lens  
7 Attorneys for Fox  
8 Plaintiffs and Counterclaim Defendants

9 Dated: December 8, 2015 Respectfully submitted,  
10 PAUL L. GALE  
11 PETER N. VILLAR  
12 TROUTMAN SANDERS LLP

13 By: /s/ Peter N. Villar  
14 Peter N. Villar  
15 Attorneys for Empire Distribution  
16 Defendant and Counterclaimant

17 Pursuant to Local Rule 5-4.3.4(a)(2)(i), the filer attests that all other signatories  
18 listed, and on whose behalf the filing is submitted, concur in the filing's content and  
19 have authorized the filing.

20 Dated: December 8, 2015 Respectfully submitted,  
21 O'MELVENY & MYERS LLP  
22 By: /s/ Molly M. Lens  
23 Molly M. Lens  
24 Attorneys for Fox  
25 Plaintiffs and Counterclaim Defendants  
26  
27  
28

# **EXHIBIT 25**

## Volpe, Stephen

---

**From:** Villar, Peter N. <Peter.Villar@troutmansanders.com>  
**Sent:** Wednesday, December 09, 2015 4:38 PM  
**To:** Lens, Molly  
**Cc:** Petrocelli, Daniel; Biscay, Cameron H.; Bowler, John M.; Henner, Lindsay Mitchell; Gale, Paul L.  
**Subject:** Empire

Molly –

I wanted to follow up on our discussion yesterday regarding deposition dates and the “priority” of the depositions we have noticed. As mentioned, our first priority is the 30(b)(6) deposition. While you mentioned that you would be serving objections to certain topics of inquiry in the deposition notice by the end of the week, we intend to proceed with the deposition and can work with you to resolve any such issues before, during and/or after the deposition. The next priorities would be Geoff Bywater and Shannon Ryan. Please provide dates for those witnesses as soon as possible and then we can discuss dates for the other witnesses.

In addition, as discussed, please let me know when we can expect the production of documents by Danny Strong, Lee Daniels and Lee Daniels Entertainment in response to the subpoenas as those documents will be needed for the depositions.

Regards,

Peter

Peter N. Villar  
[Troutman Sanders LLP](#)  
5 Park Plaza  
Suite 1400  
Irvine, CA 92614-2545  
Tel: 949-622-2783  
Fax: 949-622-2739  
Email: [peter.villar@troutmansanders.com](mailto:peter.villar@troutmansanders.com)

---

This e-mail communication (including any attachments) may contain legally privileged and confidential information intended solely for the use of the intended recipient. If you are not the intended recipient, you should immediately stop reading this message and delete it from your system. Any unauthorized reading, distribution, copying or other use of this communication (or its attachments) is strictly prohibited.

# **EXHIBIT 26**

PHILIP JOHNSON - 12/29/2015

Page 1

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
WESTERN DIVISION

TWENTIETH CENTURY FOX )  
TELEVISION, a division of )  
TWENTIETH CENTURY FOX FILM ) Case No.  
CORPORATION, a Delaware ) 2:15-cv-02158-PA-FFM  
corporation; and FOX )  
BROADCASTING COMPANY, a )  
Delaware corporation, )  
Plaintiffs, )  
vs. )  
EMPIRE DISTRIBUTION INC., a )  
California corporation, )  
Defendant. )  
\_\_\_\_\_)  
\_\_\_\_\_)  
AND RELATED COUNTERCLAIM )  
\_\_\_\_\_)

DEPOSITION OF: PHILIP JOHNSON

DATE: Tuesday, December 29, 2015

REPORTED BY: George A. Haas, CSR 5939

Job Number 599889

HUTCHINGS LITIGATION SERVICES - GLOBAL LEGAL SERVICES  
800.697.3210

EXHIBIT 26





PHILIP JOHNSON - 12/29/2015

12 (Pages 42 to 45)

Page 42	Page 44
<p>1 the Amazon Desktop/Laptop. 2 A. Yes. 3 Q. For a respondent in your survey who is 4 looking at that Amazon Desktop/Laptop page to respond 10:19:05 5 he was confused by the Empire word mark or a 6 variation, what must transpire? 7 MR. RAPHAEL: Objection, vague. 8 THE WITNESS: Primarily they would have to 9 identify the Empire TV show of Fox or TV show as 10:19:29 10 being the source or being related or being 11 authorized. 12 BY MR. BOWLER: 13 Q. Before they get there, would the 14 respondent first have to recognize that the album was 10:19:48 15 made or put out by Empire Distribution? 16 A. I don't understand that question. 17 Q. If a respondent looking at the Amazon 18 Desktop/Laptop stimuli doesn't recognize that the 19 album was made or put out by Empire Distribution, 10:20:20 20 then how would you measure confusion? 21 A. It says on the exhibit, 2014 Empire 22 Distribution/Republic. So they are exposed to it. 23 The question is do they get confused and associate 24 this product page with Empire the TV show. That's 10:21:00 25 the measure of confusion.</p>	<p>1 Q. If respondents are unable to link the 2 stimuli, this particular stimuli with Empire 3 Distribution, would that impact the ability to 4 identify reverse confusion? 10:22:46 5 A. No. 6 Q. Why not? 7 A. Because you have exposed them. It's 8 the exposure that counts. Whether the word is 9 meaningful or important to them is the point. You 10:22:55 10 are trying to see whether the exposure causes people 11 to become confused. That's what reverse confusion 12 is. 13 Q. I know you are talking about exposure. 14 If the respondents don't see the word "Empire" on the 10:23:15 15 second screen page you just referred to, would that 16 impact give you difficulty in identifying reverse 17 confusion? 18 MR. RAPHAEL: Objection, asked and answered. 19 THE WITNESS: No. 10:23:38 20 BY MR. BOWLER: 21 Q. You conducted the survey using 22 different stimuli. You testified earlier you could 23 have? 24 A. It's the same when you are conducting 10:24:01 25 any survey. You can always do things differently.</p>
Page 43	Page 45
<p>1 Q. My question is a bit more specific. 2 If in order to identify reverse 3 confusion is it necessary that respondents be able to 4 link their chosen stimuli, in this case on the Amazon 10:21:24 5 Desktop/Laptop, with some sort of distribution? 6 A. I'm not sure what you mean by "link." 7 The very first thing it says Sage to 8 Gemini March 25, 2014, hip hop or rap, 2014, Empire 9 Recording - 10:21:45 10 I'm sorry. Am I on the wrong page. 11 Q. Yes. 12 A. The Amazon page says -- 13 Q. You are on Page No. 2, the second 14 screen. 10:21:54 15 A. Yes. This is shown on two pages, but 16 it's scrolled as one on the actual exhibit. 17 Empire Distribution/Republic, copyright 18 2014, Empire Recording and exclusive license to 19 Republic Records, a division of UMG Recordings Inc. 10:22:12 20 So in the exhibit they are exposed to 21 that. Whether or not that registers with them is the 22 whole point of doing the survey. You are exposed to 23 it as you would normally be exposed to it when you 24 are purchasing this product on an Amazon 10:22:29 25 Desktop/Laptop site.</p>	<p>1 You can always. 2 Q. Did you consider using different 3 stimuli other than the Sage to Gemini album that you 4 said you saw referenced in the counterclaim? 10:24:16 5 A. As I said, you could. But when I 6 looked at the products referenced in the 7 counterclaim, this was the one product that did have 8 an Empire Distribution identification on each of the 9 critical portals where you could purchase the 10:24:35 10 product. So it's a uniquely good choice. 11 Actually, I do not see anything that 12 would have been nearly as good as this choice. 13 Q. I thought you testified you hadn't made 14 any investigation outside of Snoop Dogg and a couple 10:24:51 15 of other artists referenced? 16 A. I think that the things were referenced 17 in the counterclaim, and this was clearly the one 18 used to be representative. 19 Q. Let's go back to how much time the 10:25:15 20 average purchaser spends buying hip hop music. 21 Do purchasers of hip hop or rap make 22 involved, deliberate decisions as do purchasers of 23 any other genre of music? 24 A. I'm not aware of their purchase 10:25:42 25 decision or that the depth of thinking that goes into</p>

PHILIP JOHNSON - 12/29/2015

16 (Pages 58 to 61)

Page 58

Page 60

1 Q. What was Republic's role in the  
2 production or distribution of the Sage to Gemini  
3 album; do you know?

10:48:12 4 A. It said in the counterclaim they were  
5 the artist and the best selling album. I don't  
6 recall exactly what they did.

7 Q. Do you know if Empire Distribution has  
8 put out albums on its own and not through Republic  
9 Records?

10:48:37 10 A. I don't know the ways they do things.

11 Q. Some of your respondents actually  
12 answered Question No. 2a with the name Republic and  
13 not Empire; is that correct?

10:48:56 14 A. Well, they answered Republic. I don't  
15 know if they also said Empire or not.

16 Q. Would you expect more than 20  
17 respondents to have answered Question No. 2a by  
18 naming Empire Distribution?

19 A. Not particularly, no.

10:49:31 20 Q. Why not?

21 A. Why would I?

22 Q. I'm just asking the question.

23 A. I don't know how else to answer it.

10:49:41 24 I see no reason why I would expect more  
25 than that.

1 Q. You just said that respondents other  
2 than those 2 percent were actually thinking of Empire  
3 Distribution who were exposed to the stimuli?

10:51:37 4 A. No.

5 Q. How is that not speculation?

6 A. It's not speculation. It's the tip of  
7 the iceberg for the ones that actually named them  
8 because there are other things they can name and say  
9 what they know about it. They were all exposed to  
10 it.

10:51:53 11 Q. You don't know how many of the  
12 respondents actually saw the words "Empire  
13 Distribution" on that stimuli?

14 A. Everyone was shown it on the stimuli.

10:52:04 15 Q. That's a different question.  
16 You have shown the stimuli, but you  
17 don't know how many respondents actually saw the  
18 words, registered the words "Empire Distribution"?

10:52:16 19 A. They all were exposed to the words in  
20 the normal context of a purchase. Whether it was  
21 important information to them and whether they  
22 assimilated it as part of an important part of the  
23 purchase cycle is what it is. That's how they shop.  
24 That's why you do things this way. This is  
25 recreating the purchase cycle.

Page 59

Page 61

1 Q. 20 respondents who answered Question  
2 No. 2a with Empire Distribution represent  
3 approximately what percentage of your total study,  
4 about 2 percent?

10:50:05 5 A. About 2 percent. It was roughly 1,000  
6 people.

7 Q. Does this mean that in subsequent  
8 questions when respondents are asked, for example, in  
9 Question No. 3a, what other products are put out by  
10 this company, that only 2 percent of respondents are  
11 thinking of Empire Distribution?

10:50:31 12 A. Nobody said 2 percent of the people  
13 were thinking of Empire Distribution.

10:50:47 14 2 percent specifically named them, but  
15 that doesn't mean only 2 percent are thinking of  
16 them.

17 Q. Your survey by no means is able to  
18 measure how many people were actually thinking about  
19 Empire Distribution?

10:51:03 20 A. 100 percent of them were exposed to  
21 Empire Distribution. So in the conducts of a typical  
22 purchasing cycle, having that exposure, they are all  
23 thinking of them. What they know about them or what  
24 they care about them or how important that is to them  
10:51:19 25 is what it is in the typical purchasing cycle.

1 Q. You don't know as you sit here how many  
2 of the respondents may not have even actually seen  
3 the words "Empire Distribution" on the stimuli?

10:52:46 4 A. I believe they all saw it.

5 Q. What is your basis for saying that?

6 A. It was shown in the stimuli.

7 Q. And that's your only basis?

8 A. That's my basis, yes.

10:53:41 9 Q. How many respondents answered Question  
10 No. 2a with the answer Don't Know?

11 A. 60 percent.

12 Q. You are looking on what page of your  
13 report?

14 A. Page No. 18.

10:54:15 15 Q. Under your table?

16 A. In the table, in the Total column.

17 Q. So more than half your survey  
18 respondents did not provide an answer other than  
19 Don't Know to Question No. 2a?

10:54:35 20 A. Well, 60 percent answered that they  
21 don't know who makes it.

22 Q. Does that 60 percent suggest that  
23 respondents were confused by the phrase "makes or  
24 puts out"?

10:54:51 25 A. No, not at all.



PHILIP JOHNSON - 12/29/2015

17 (Pages 62 to 65)

Page 62

1 Q. Why not?

2 A. First, this is typical for an Eveready  
3 study.

4 Secondly, it shows they really don't

10:55:01 5 know who makes or puts it out.

6 Q. Is it your testimony that 60 percent of  
7 respondents in an Eveready study don't know the  
8 answer to the who makes or puts out question?

10:55:33 9 A. I said that's not atypical. It's a  
10 frequent kind of percent. Yes, it's not an unusual  
11 number is what I said, I believe.

12 Q. Does that percentage suggest that  
13 respondents could not answer Question No. 2a based on  
14 the stimuli that were used?

10:55:53 15 A. No, it does not.

16 Q. Why not?

17 A. As I said, it's pretty typical. But it  
18 would be easiest -- it didn't register who the  
19 producer was in a way that is important to them, in a  
20 way they are able to recall it subsequently.

10:56:09 21 Q. Did any of the respondents respond to  
22 your question by saying some of them were confusing?

23 A. I'm not sure I understand the question.

24 Q. Did any respondents respond to, for  
25 example, Question No. 3a, stating it was confusing?

10:56:27

Page 64

1 A. Usually you can't have reverse

2 confusion if -- unless the junior user's mark is  
3 well-known so it comes to mind when you see the  
4 senior user. The senior user's name is not usually  
5 available, it's the junior user's. If the junior  
6 user's isn't well-known, it couldn't come to mind  
7 easily.

8 Q. Let me tweak the question a little.

9 In a reverse confusion case, does the  
10 Eveready survey format assume that the respondents  
11 are aware of the junior user's mark from prior  
12 experiences?

13 A. "Assume" is the word I'm struggling  
14 with. I'm trying to measure what is the degree of  
15 confusion in the entire universe of people. So you  
16 show them the senior user's mark, and if it doesn't  
17 call to mind the junior user, then there is no  
18 confusion with the junior user.

19 So the junior user, to the extent they  
20 are known, that's the level of confusion you measure.  
21 But that's what you are trying to do, is measure what  
22 the actual confusion level is in the whole world.

23 Q. In your survey, who would be  
24 characterized as confused?

25 A. People who named the Fox television

10:59:14

10:59:43

11:00:02

11:00:25

11:00:40

Page 63

1 A. There are always a few people in the  
2 survey who say a question is confusing or repetitive,  
3 and they don't understand it.

4 Q. Are there instances where use of the  
5 Eveready format is more appropriate than others?

10:57:06

6 A. The general fact is to use the Eveready  
7 survey. It's considered the gold standard of  
8 computing surveys.

9 Q. Is an Eveready study particularly  
10 appropriate if the senior mark is strong and widely  
11 recognized?

10:57:45

12 A. It depends if you are doing forward and  
13 reverse.

14 Usually a reverse confusion study is  
15 the least used mark that needs to be well-known for  
16 it to come to mind otherwise there would be no  
17 confusion if it was not well-known.

10:58:03

18 Maybe I didn't understand the question.

19 Q. You answered it.

20 In a reverse confusion case, does the  
21 Eveready survey format assume that respondents are  
22 aware of the senior user's mark from prior  
23 experiences?

10:58:21

24 A. Senior user?

25 Q. Yes.

10:58:51

Page 65

1 show when they are given the stimulus of the senior  
2 user.

3 Q. Did that occur?

4 A. Only in two instances out of 1050, 1060  
5 exposures.

6 Q. Can anyone else be characterized as  
7 confused other than someone who answered that Fox or  
8 the TV show puts out the product? Anyone shown those  
9 stimuli.

10 A. I'm not sure.

11 Q. I'm not sure either.

12 If the respondent correctly answered  
13 that Empire Distribution puts out the product shown  
14 in the stimuli, but mentioned the television show  
15 Empire or any other Fox TV show when asked what other  
16 products are put out by Empire Distribution in  
17 Question No. 3a, would that respondent be  
18 characterized as confused?

19 A. Any respondent was confused who gave an  
20 answer that the Fox TV show or Empire the TV show or  
21 the Simpson's or other Fox TV show product came from  
22 the same people who put out the album they were shown  
23 with the Empire Distribution label on it.

24 Q. Did the scenario I just asked about  
25 ever happen?

11:01:07

11:01:34

11:02:05

11:02:25

11:02:43

PHILIP JOHNSON - 12/29/2015

27 (Pages 102 to 104)

Page 102	Page 104
<p>1 trial?</p> <p>2 A. These are all trials.</p> <p>3 Q. Did you have any going back to October</p> <p>4 1, going back another here, did you have any more</p> <p>12:28:40 5 trials?</p> <p>6 A. This is the last 48 months. That's</p> <p>7 four years.</p> <p>8 Q. It asks for six years.</p> <p>9 A. It's 2015 now. That's 48 months.</p> <p>12:28:57 10 Q. We are missing a year?</p> <p>11 A. Yes.</p> <p>12 MR. BOWLER: I have no other questions.</p> <p>13 MR. RAPHAEL: Okay.</p> <p>14 It's 12:30, we started at 9:00.</p> <p>12:29:42 15</p> <p>16 (The deposition was concluded</p> <p>17 at 12:30 P.M.)</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>1 Certificate</p> <p>2 Of</p> <p>3 Certified Shorthand Reporter</p> <p>4</p> <p>5 I, George A. Haas, Certified Shorthand</p> <p>6 Reporter, duly qualified in and for the State of</p> <p>7 California, do hereby certify there came before me</p> <p>8 the deponent herein, who was by me duly sworn to</p> <p>9 testify to the truth and nothing but the truth</p> <p>10 concerning the matters in this cause.</p> <p>11 I further certify that the foregoing</p> <p>12 transcript is a true and correct transcript of my</p> <p>13 original stenographic notes.</p> <p>14 I further certify that I am neither</p> <p>15 attorney or counsel for, nor related to or employed</p> <p>16 by any of the parties to the action in which this</p> <p>17 deposition is taken; and furthermore, that I am not a</p> <p>18 relative or employee of any attorney or counsel,</p> <p>19 employed by the parties hereto or financially</p> <p>20 interested in said action.</p> <p>21 IN WITNESS WHEREOF, I have hereunto set</p> <p>22 my hand this day of 2015.</p> <p>23</p> <p>24</p> <p>25</p> <p>GEORGE A. HAAS, CSR NO. 5939</p>
Page 103	
<p>1 WITNESS'S DECLARATION</p> <p>2</p> <p>3 I, PHILIP JOHNSON, declare under</p> <p>4 penalty of perjury that I have read the foregoing</p> <p>5 transcript and that I have made any corrections,</p> <p>6 additions, or deletions that I was desirous of making</p> <p>7 in order to render the within transcript true and</p> <p>8 correct.</p> <p>9 IN WITNESS WHEREOF, I have hereunto</p> <p>10 subscribed my name this _____ day of</p> <p>11 _____ 2015.</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p>PHILIP JOHNSON</p>	

# **EXHIBIT 27**



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

TWENTIETH CENTURY FOX )  
TELEVISION, a division of )  
TWENTIETH CENTURY FOX FILM )  
CORPORATION, a Delaware )  
company, and FOX BROADCASTING )  
COMPANY, a Delaware )  
corporation, )

Plaintiff, )

vs. )

No. 2:15-cv-02158-PA-FFM

EMPIRE DISTRIBUTION, INC., a )  
California corporation, )

Defendant. )

AND RELATED COUNTERCLAIM. )

DEPOSITION OF DEBORAH JAY, Ph.D.

Menlo Park, California

Wednesday, December 30, 2015

Job Number 599890

Reported by:

JANIS JENNINGS, CSR, CLR, CCRR



DEBORAH JAY, Ph.D. - 12/30/2015

Page 18

1 Q. Okay. How did you choose the stimuli for the  
2 survey?

3 A. I wanted -- I looked at materials associated  
4 with the television series as well as watching the  
5 television series, and it was my understanding that the  
6 greatest exposure in connection with the television --  
7 with the television show would be the series itself.  
8 And because the trailers are clips from the series, that  
9 represents -- was the best representation of what people  
10 would be exposed to who were potential viewers of the  
11 show or viewers of the show. So it seemed to be the  
12 most appropriate stimulus, plus I was aware that the  
13 particular trailers that I showed also were shown the  
14 most frequently on the Fox channel so that, again, this  
15 was a stimulus that I thought -- or these were the  
16 stimuli that people would be -- would capture the most  
17 exposure and also adequately or provide an excellent  
18 description of what the show is about.

19 Q. Could your --

20 MS. LENS: Sorry. Before you ask your next  
21 question, my pen keeps running out. Can we either go  
22 off or can I just run out and grab another one.

23 MR. BOWLER: Yeah. Let's go off the record.

24 (Off the record.)

25 / / /



DEBORAH JAY, Ph.D. - 12/30/2015

Page 19

1 BY MR. BOWLER:

2 Q. Where in the -- strike the question.

3 Could you describe -- why did you use two of  
4 the trailers?

5 A. Because ordinarily, when one does -- chose an  
6 advertisement in Lanham Act surveys, one shows it twice  
7 and so I thought rather than showing the same trailer  
8 twice, it would be best to show the trailer -- one  
9 trailer for the series premiere or the first season and  
10 then another trailer for the second season. So I -- it  
11 was consistent with the standard way that advertisements  
12 are shown in Lanham Act surveys.

13 Q.. Could you have used a -- one of the video  
14 trailers as a stimulus and then as a second stimulus  
15 something else like a screenshot of the -- a show's  
16 advertisement?

17 MS. LENS: Incomplete hypothetical.

18 You can answer.

19 THE WITNESS: Again, I think what I did was  
20 the most appropriate and it captured what the largest  
21 percentage of potential consumers would be exposed to.  
22 Plus my understanding is that Empire Distribution  
23 objects to the television series and I believe that the  
24 trailers best characterized the television series.

25 / / /



DEBORAH JAY, Ph.D. - 12/30/2015

Page 20

1 BY MR. BOWLER:

2 Q. Do you know if Empire Distribution objects to  
3 the Empire series music?

4 MS. LENS: Objection. Vague and ambiguous.

5 You can answer.

6 THE WITNESS: My understanding is that Empire  
7 Distribution objects to the television series and  
8 anything associated with the television series.

9 BY MR. BOWLER:

10 Q. Did you consider using as a stimulus the  
11 Empire series music, the compilation CD?

12 MS. LENS: Objection. Vague and ambiguous.  
13 Incomplete hypothetical.

14 You can answer.

15 BY MR. BOWLER:

16 Q. Do you understand the question?

17 A. Are you talking about the Empire television  
18 series soundtrack?

19 Q. Correct.

20 A. I considered all the advertising as well as  
21 materials associated with the television series, but I  
22 selected what I thought would have the largest exposure,  
23 that the most people would be exposed to. And so I  
24 believe that the trailers reflect the content of the  
25 series and that the most people would be exposed to the

DEBORAH JAY, Ph.D. - 12/30/2015

Page 21

1 series, and therefore the trailers represented the best  
2 stimuli.

3 Furthermore, I understand that people who  
4 might buy products associated with the television show  
5 would most likely be exposed to the television show  
6 first, therefore it makes sense to show them something  
7 that reflects the content of the show.

8 Q. Did you make an assumption that most people  
9 would be exposed to the Empire series show before being  
10 exposed to the series music?

11 A. It's my general understanding that people who  
12 buy soundtracks, whether it's for a play or a movie or a  
13 television show, are often viewers of the play, the  
14 television show, or the movie, that that -- that what  
15 comes first often -- and that there are more people  
16 exposed to the television series than the soundtrack.

17 Q. Do you know if Fox releases individual songs  
18 following the show, other than in a compilation format?

19 MS. LENS: Objection. Vague and ambiguous.  
20 Assumes facts not in evidence.

21 You can answer.

22 BY MR. BOWLER:

23 Q. The question was, do you know if they do that?

24 MS. LENS: Same objections.

25 THE WITNESS: I don't recall whether it's

DEBORAH JAY, Ph.D. - 12/30/2015

Page 22

1 albums or individual songs. I don't recall.

2 BY MR. BOWLER:

3 Q. Do you know if consumers can purchase an  
4 individual Empire series song as they've heard it on the  
5 radio without ever having seen the show before?

6 A. My understanding is that people can purchase  
7 soundtracks or songs related to a television series  
8 without having seen the television series, but that far  
9 fewer people purchase soundtracks or songs associated  
10 with a television series. In other words, it's a subset  
11 of the overall viewership and that the majority of the  
12 people who purchase songs or soundtracks would be  
13 viewers. So that's my understanding.

14 Q. In what context would respondents typically  
15 see trailers for a TV show?

16 MS. LENS: Objection. Overbroad. Incomplete  
17 hypothetical. Calls for speculation.

18 You can answer.

19 THE WITNESS: Well, you see trailers on  
20 television, but the trailers contain clips from the show  
21 so they also are generalizable to the show. And if you  
22 look at some of Empire's advertising other, for example,  
23 the billboards, they contain the same information that's  
24 in the trailers, even the same themes. So there's a lot  
25 of similarity between the trailers and at least some of

DEBORAH JAY, Ph.D. - 12/30/2015

Page 23

1 the advertising, posters, billboards, as well as the  
2 content of the show. The theme of, you know, they  
3 mention the series, they mention "power," "family," "the  
4 battle begins."

5 BY MR. BOWLER:

6 Q. Would respondents typically see trailers for a  
7 TV show in the process of watching another TV show?

8 MS. LENS: Objection. Overbroad. Incomplete  
9 hypothetical.

10 You can answer.

11 THE WITNESS: Again, trailers -- I don't know  
12 all of the places that people would see the trailers.  
13 I've seen trailers for television shows in a movie  
14 theater, not just on television. I -- it's just my  
15 understanding that it was the most representative of the  
16 content of the show. And also, most people would be  
17 exposed to either the trailers or the show relative to  
18 other advertising or products associated with the show.

19 BY MR. BOWLER:

20 Q. Would respondents also see trailers for a TV  
21 show when they're actively searching for the show's  
22 trailers?

23 MS. LENS: Objection. Overbroad. Incomplete  
24 hypothetical. Calls for speculation.

25 You can answer.

DEBORAH JAY, Ph.D. - 12/30/2015

Page 24

1 THE WITNESS: I don't exactly know what kind  
2 of search you're talking about. I mean, you can go on  
3 the Fox website and watch trailers, you can watch  
4 trailers on YouTube, you can -- you know, there's just a  
5 variety of venues in which you can be exposed to  
6 different kinds of information. But the point is the  
7 content of the trailer not only reflects the content of  
8 the television series, but it also reflects the content  
9 of other advertising for the television series.

10 BY MR. BOWLER:

11 Q. Assume that -- assume that trailers for the  
12 Empire TV series could be found on YouTube or Google, a  
13 Google search. In either situation, could respondents  
14 have been exposed to other products or search results  
15 that contain the word "Empire"?

16 MS. LENS: Objection. Incomplete  
17 hypothetical.

18 BY MR. BOWLER:

19 Q. Or browsing?

20 MS. LENS: Calls for speculation. You can  
21 answer.

22 THE WITNESS: I am aware that there are a lot  
23 of third party uses of the word "Empire" both in the  
24 music and the entertainment industry, so a search could  
25 show the movie, Empire Records, it could show a variety

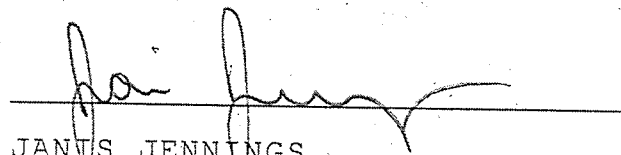
1 I, JANIS JENNINGS, a Certified Shorthand  
2 Reporter of the State of California, do hereby certify:

3 That the foregoing proceedings were taken  
4 before me at the time and place herein set forth; that  
5 any witnesses in the foregoing proceedings, prior to  
6 testifying, were placed under oath; that a verbatim  
7 record of the proceedings was made by me using machine  
8 shorthand which was thereafter transcribed under my  
9 direction; further that the foregoing is an accurate  
10 transcription thereof.

11 I further certify that I am neither  
12 financially interested in the action nor a relative or  
13 employee of any attorney or any of the parties.

14 IN WITNESS WHEREOF, I have this date  
15 subscribed my name.

16  
17 Dated: December 31, 2015

18  
19   
20 JANIS JENNINGS  
21 CSR No. 3942, CLR, CCRR  
22  
23  
24  
25

# **EXHIBIT 28**



---

**To:** Empire Distribution, Inc. ([trademarks@troutmansanders.com](mailto:trademarks@troutmansanders.com))  
**Subject:** U.S. TRADEMARK APPLICATION NO. 86590365 - EMPIRE - 247036.1  
**Sent:** 7/17/2015 3:18:26 PM  
**Sent As:** ECOM119@USPTO.GOV  
**Attachments:** [Attachment - 1](#)  
[Attachment - 2](#)  
[Attachment - 3](#)

---

**UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)  
OFFICE ACTION (OFFICIAL LETTER) ABOUT APPLICANT'S TRADEMARK APPLICATION**

U.S. APPLICATION SERIAL NO. 86590365

**MARK:** EMPIRE

**\*86590365\***

**CORRESPONDENT ADDRESS:**

AUSTIN PADGETT  
Troutman & Sanders  
600 Peachtree St NE Ste 5200  
Atlanta, GA 30308-2216

**GENERAL TRADEMARK INFORMATION**  
<http://www.uspto.gov/trademarks/index>

[VIEW YOUR APPLICATION FILE](#)

**APPLICANT:** Empire Distribution, Inc.

**CORRESPONDENT'S REFERENCE/DOCKET NO :**  
247036.1

**CORRESPONDENT E-MAIL ADDRESS:**  
[trademarks@troutmansanders.com](mailto:trademarks@troutmansanders.com)

**SUSPENSION NOTICE: NO RESPONSE NEEDED**

**ISSUE/MAILING DATE:** 7/17/2015

The trademark examining attorney is suspending action on the application for the reason stated below.  
*See* 37 C.F.R. §2.67; TMEP §§716 *et seq.*

**PRIOR-FILED PENDING APPLICATION FOUND:** The trademark examining attorney has searched the USPTO's database of registered and pending marks and has found no similar registered marks that would bar registration under Trademark Act Section 2(d). TMEP §704.02; *see* 15 U.S.C. §1052(d). However, a mark in a prior-filed pending application may present a bar to registration of applicant's mark.

The effective filing date of the pending application identified below precedes the filing date of applicant's application. If the mark in the referenced application registers, applicant's mark may be refused registration under Section 2(d) because of a likelihood of confusion with that registered mark. *See*



15 U.S.C. §1052(d); 37 C.F.R. §2.83; TMEP §§1208 *et seq.* Therefore, action on this application is suspended until the earlier-filed referenced application is either registered or abandoned. 37 C.F.R. §2.83(c). A copy of information relevant to this referenced application is attached.

- Application Serial No(s). 86498111

The USPTO will periodically conduct a status check of the application to determine whether suspension remains appropriate, and the trademark examining attorney will issue as needed an inquiry letter to applicant regarding the status of the matter on which suspension is based. TMEP §§716.04, 716.05. Applicant will be notified when suspension is no longer appropriate. *See* TMEP §716.04.

No response to this notice is necessary; however, if applicant wants to respond, applicant should use the "Response to Suspension Inquiry or Letter of Suspension" form online at <http://teasroa.uspto.gov/rsi/rsi>.

### RESPONSE GUIDELINES

To expedite prosecution of the application, applicant is encouraged to file its response to this Office action online via the Trademark Electronic Application System (TEAS), which is available at <http://www.uspto.gov/trademarks/teas/index.jsp>. If applicant has technical questions about the TEAS response to Office action form, applicant can review the electronic filing tips available online at [http://www.uspto.gov/trademarks/teas/e\\_filing\\_tips.jsp](http://www.uspto.gov/trademarks/teas/e_filing_tips.jsp) and e-mail technical questions to [TEAS@uspto.gov](mailto:TEAS@uspto.gov).

If applicant has questions regarding this Office action, please telephone or e-mail the assigned trademark examining attorney. All relevant e-mail communications will be placed in the official application record; however, an e-mail communication will not be accepted as a response to this Office action and will not extend the deadline for filing a proper response. *See* 37 C.F.R. §§2.62(c), 2.191; TMEP §§304.01-.02, 709.04-.05. Further, although the trademark examining attorney may provide additional explanation pertaining to the refusal(s) and/or requirement(s) in this Office action, the trademark examining attorney may not provide legal advice or statements about applicant's rights. *See* TMEP §§705.02, 709.06.

**Note:** The Trademark Status and Document Retrieval (TSDR) database on the USPTO website at <http://tsdr.uspto.gov/> is available 24 hours a day, 7 days a week, and provides status information about trademark and service mark applications and registrations. To view this information, enter the application serial number or registration number and click on "Status."

/Toby E. Bulloff/  
Trademark Examining Attorney  
Law Office 119  
(571) 270-1531  
[toby.bulloff@uspto.gov](mailto:toby.bulloff@uspto.gov)

**PERIODICALLY CHECK THE STATUS OF THE APPLICATION:** To ensure that applicant does not miss crucial deadlines or official notices, check the status of the application every three to four months using the Trademark Status and Document Retrieval (TSDR) system at <http://tsdr.uspto.gov/>. Please keep

a copy of the TSDR status screen. If the status shows no change for more than six months, contact the Trademark Assistance Center by e-mail at [TrademarkAssistanceCenter@uspto.gov](mailto:TrademarkAssistanceCenter@uspto.gov) or call 1-800-786-9199. For more information on checking status, see <http://www.uspto.gov/trademarks/process/status/>.

**TO UPDATE CORRESPONDENCE/E-MAIL ADDRESS:** Use the Trademark Electronic Application System (TEAS) form at <http://www.uspto.gov/trademarks/teas/correspondence.jsp>.

Print: Jul 17, 2015

86498111

**DESIGN MARK**

**Serial Number**

86498111

**Status**

NOTICE OF UNRESPONSIVE AMENDMENT - MAILED

**Word Mark**

AUDIO EMPIRE

**Standard Character Mark**

Yes

**Type of Mark**

SERVICE MARK

**Register**

PRINCIPAL

**Mark Drawing Code**

(4) STANDARD CHARACTER MARK

**Owner**

Brunston, Roy INDIVIDUAL UNITED STATES 105 Herman St Hackensack NEW JERSEY 07601

**Owner**

Marcus, Dave INDIVIDUAL UNITED STATES 56 Irving Place Garfield NEW JERSEY 07026

**Owner**

Manfre, Chris INDIVIDUAL UNITED STATES 56 Irving Place Garfield NEW JERSEY 07026

**Goods/Services**

Class Status -- ACTIVE. IC 041. US 100 101 107. G & S:  
Entertainment rendered by a musical group, namely, entertainment in the nature of live visual and audio performances by a musical group; live performances by a musical group; Providing an Internet website portal in the field of music; Entertainment services, namely, live, televised and movie appearances by a musical group; Entertainment services, namely, personal appearances by a musical group.

**Filing Date**

2015/01/08

**Examining Attorney**

DELGIZZI, RONALD E.

**Attorney of Record**

-1-

Print: Jul 17, 2015

86498111

Mitesh Patel

-2-

# AUDIO EMPIRE



---

**To:** Empire Distribution, Inc. ([trademarks@troutmansanders.com](mailto:trademarks@troutmansanders.com))  
**Subject:** U.S. TRADEMARK APPLICATION NO. 86590365 - EMPIRE - 247036.1  
**Sent:** 7/17/2015 3:18:27 PM  
**Sent As:** ECOM119@USPTO.GOV  
**Attachments:**

---

**UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)**

**IMPORTANT NOTICE REGARDING YOUR  
U.S. TRADEMARK APPLICATION**

USPTO OFFICE ACTION (OFFICIAL LETTER) HAS ISSUED  
ON 7/17/2015 FOR U.S. APPLICATION SERIAL NO. 86590365

Please follow the instructions below:

**(1) TO READ THE LETTER:** Click on this link or go to <http://tsdr.uspto.gov/>, enter the U.S. application serial number, and click on "Documents."

The Office action may not be immediately viewable, to allow for necessary system updates of the application, but will be available within 24 hours of this e-mail notification.

**(2) QUESTIONS:** For questions about the contents of the Office action itself, please contact the assigned trademark examining attorney. For *technical* assistance in accessing or viewing the Office action in the Trademark Status and Document Retrieval (TSDR) system, please e-mail [TSDR@uspto.gov](mailto:TSDR@uspto.gov).

**WARNING**

**PRIVATE COMPANY SOLICITATIONS REGARDING YOUR APPLICATION:** Private companies **not** associated with the USPTO are using information provided in trademark applications to mail or e-mail trademark-related solicitations. These companies often use names that closely resemble the USPTO and their solicitations may look like an official government document. Many solicitations require that you pay "fees."

Please carefully review all correspondence you receive regarding this application to make sure that you are responding to an official document from the USPTO rather than a private company solicitation. All official USPTO correspondence will be mailed only from the "United States Patent and Trademark Office" in Alexandria, VA; or sent by e-mail from the domain "@uspto.gov." For more information on how to handle private company solicitations, see [http://www.uspto.gov/trademarks/solicitation\\_warnings.jsp](http://www.uspto.gov/trademarks/solicitation_warnings.jsp).

# **EXHIBIT 29**



---

**To:** Empire Distribution, Inc. ([trademarks@troutmansanders.com](mailto:trademarks@troutmansanders.com))  
**Subject:** U.S. TRADEMARK APPLICATION NO. 86590402 - EMPIRE - 247036.1  
**Sent:** 7/17/2015 3:17:52 PM  
**Sent As:** ECOM119@USPTO.GOV  
**Attachments:** [Attachment - 1](#)  
[Attachment - 2](#)  
[Attachment - 3](#)

---

**UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)  
OFFICE ACTION (OFFICIAL LETTER) ABOUT APPLICANT'S TRADEMARK APPLICATION**

U.S. APPLICATION SERIAL NO. 86590402

**MARK:** EMPIRE

**\*86590402\***

**CORRESPONDENT ADDRESS:**

AUSTIN PADGETT  
Troutman & Sanders  
600 Peachtree St NE Ste 5200  
Atlanta, GA 30308-2216

**GENERAL TRADEMARK INFORMATION**  
<http://www.uspto.gov/trademarks/index>

[VIEW YOUR APPLICATION FILE](#)

**APPLICANT:** Empire Distribution, Inc.

**CORRESPONDENT'S REFERENCE/DOCKET NO. :**  
247036.1

**CORRESPONDENT E-MAIL ADDRESS:**  
[trademarks@troutmansanders.com](mailto:trademarks@troutmansanders.com)

**SUSPENSION NOTICE: NO RESPONSE NEEDED**

**ISSUE/MAILING DATE:** 7/17/2015

The trademark examining attorney is suspending action on the application for the reason stated below.  
*See* 37 C.F.R. §2.67; TMEP §§716 *et seq.*

**PRIOR-FILED PENDING APPLICATION FOUND:** The trademark examining attorney has searched the USPTO's database of registered and pending marks and has found no similar registered marks that would bar registration under Trademark Act Section 2(d). TMEP §704.02; *see* 15 U.S.C. §1052(d). However, a mark in a prior-filed pending application may present a bar to registration of applicant's mark.

The effective filing date of the pending application identified below precedes the filing date of applicant's application. If the mark in the referenced application registers, applicant's mark may be refused registration under Section 2(d) because of a likelihood of confusion with that registered mark. *See*

15 U.S.C. §1052(d); 37 C.F.R. §2.83; TMEP §§1208 *et seq.* Therefore, action on this application is suspended until the earlier-filed referenced application is either registered or abandoned. 37 C.F.R. §2.83(c). A copy of information relevant to this referenced application is attached.

- Application Serial No(s). 86498111

The USPTO will periodically conduct a status check of the application to determine whether suspension remains appropriate, and the trademark examining attorney will issue as needed an inquiry letter to applicant regarding the status of the matter on which suspension is based. TMEP §§716.04, 716.05. Applicant will be notified when suspension is no longer appropriate. *See* TMEP §716.04.

No response to this notice is necessary; however, if applicant wants to respond, applicant should use the "Response to Suspension Inquiry or Letter of Suspension" form online at <http://teasroa.uspto.gov/rsi/rsi>.

### RESPONSE GUIDELINES

To expedite prosecution of the application, applicant is encouraged to file its response to this Office action online via the Trademark Electronic Application System (TEAS), which is available at <http://www.uspto.gov/trademarks/teas/index.jsp>. If applicant has technical questions about the TEAS response to Office action form, applicant can review the electronic filing tips available online at [http://www.uspto.gov/trademarks/teas/e\\_filing\\_tips.jsp](http://www.uspto.gov/trademarks/teas/e_filing_tips.jsp) and e-mail technical questions to [TEAS@uspto.gov](mailto:TEAS@uspto.gov).

If applicant has questions regarding this Office action, please telephone or e-mail the assigned trademark examining attorney. All relevant e-mail communications will be placed in the official application record; however, an e-mail communication will not be accepted as a response to this Office action and will not extend the deadline for filing a proper response. *See* 37 C.F.R. §§2.62(c), 2.191; TMEP §§304.01-.02, 709.04-.05. Further, although the trademark examining attorney may provide additional explanation pertaining to the refusal(s) and/or requirement(s) in this Office action, the trademark examining attorney may not provide legal advice or statements about applicant's rights. *See* TMEP §§705.02, 709.06.

**Note:** The Trademark Status and Document Retrieval (TSDR) database on the USPTO website at <http://tsdr.uspto.gov/> is available 24 hours a day, 7 days a week, and provides status information about trademark and service mark applications and registrations. To view this information, enter the application serial number or registration number and click on "Status."

/Toby E. Bulloff/  
Trademark Examining Attorney  
Law Office 119  
(571) 270-1531  
[toby.bulloff@uspto.gov](mailto:toby.bulloff@uspto.gov)

**PERIODICALLY CHECK THE STATUS OF THE APPLICATION:** To ensure that applicant does not miss crucial deadlines or official notices, check the status of the application every three to four months using the Trademark Status and Document Retrieval (TSDR) system at <http://tsdr.uspto.gov/>. Please keep

a copy of the TSDR status screen. If the status shows no change for more than six months, contact the Trademark Assistance Center by e-mail at [TrademarkAssistanceCenter@uspto.gov](mailto:TrademarkAssistanceCenter@uspto.gov) or call 1-800-786-9199. For more information on checking status, see <http://www.uspto.gov/trademarks/process/status/>.

**TO UPDATE CORRESPONDENCE/E-MAIL ADDRESS:** Use the Trademark Electronic Application System (TEAS) form at <http://www.uspto.gov/trademarks/teas/correspondence.jsp>.



**Print:** Jul 17, 2015

**86498111**

**DESIGN MARK**

**Serial Number**

86498111

**Status**

NOTICE OF UNRESPONSIVE AMENDMENT - MAILED

**Word Mark**

AUDIO EMPIRE

**Standard Character Mark**

Yes

**Type of Mark**

SERVICE MARK

**Register**

PRINCIPAL

**Mark Drawing Code**

(4) STANDARD CHARACTER MARK

**Owner**

Brunston, Roy INDIVIDUAL UNITED STATES 105 Herman St Hackensack NEW  
JERSEY 07601

**Owner**

Marcus, Dave INDIVIDUAL UNITED STATES 56 Irving Place Garfield NEW  
JERSEY 07026

**Owner**

Manfre, Chris INDIVIDUAL UNITED STATES 56 Irving Place Garfield NEW  
JERSEY 07026

**Goods/Services**

Class Status -- ACTIVE. IC 041. US 100 101 107. G & S:  
Entertainment rendered by a musical group, namely, entertainment in  
the nature of live visual and audio performances by a musical group;  
live performances by a musical group; Providing an Internet website  
portal in the field of music; Entertainment services, namely, live,  
televised and movie appearances by a musical group; Entertainment  
services, namely, personal appearances by a musical group.

**Filing Date**

2015/01/08

**Examining Attorney**

DELGIZZI, RONALD E.

**Attorney of Record**

-1-

**Print: Jul 17, 2015**

**86498111**

Mitesh Patel

-2-

EXHIBIT 29

41

# AUDIO EMPIRE

---

**To:** Empire Distribution, Inc. ([trademarks@troutmansanders.com](mailto:trademarks@troutmansanders.com))  
**Subject:** U.S. TRADEMARK APPLICATION NO. 86590402 - EMPIRE - 247036.1  
**Sent:** 7/17/2015 3:17:53 PM  
**Sent As:** ECOM119@USPTO.GOV  
**Attachments:**

---

**UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)**

**IMPORTANT NOTICE REGARDING YOUR  
U.S. TRADEMARK APPLICATION**

USPTO OFFICE ACTION (OFFICIAL LETTER) HAS ISSUED  
ON **7/17/2015** FOR U.S. APPLICATION SERIAL NO.86590402

Please follow the instructions below:

**(1) TO READ THE LETTER:** Click on this link or go to <http://tsdr.uspto.gov/>, enter the U.S. application serial number, and click on "Documents."

The Office action may not be immediately viewable, to allow for necessary system updates of the application, but will be available within 24 hours of this e-mail notification.

**(2) QUESTIONS:** For questions about the contents of the Office action itself, please contact the assigned trademark examining attorney. For *technical* assistance in accessing or viewing the Office action in the Trademark Status and Document Retrieval (TSDR) system, please e-mail [TSDR@uspto.gov](mailto:TSDR@uspto.gov).

**WARNING**

**PRIVATE COMPANY SOLICITATIONS REGARDING YOUR APPLICATION:** Private companies **not** associated with the USPTO are using information provided in trademark applications to mail or e-mail trademark-related solicitations. These companies often use names that closely resemble the USPTO and their solicitations may look like an official government document. Many solicitations require that you pay "fees."

Please carefully review all correspondence you receive regarding this application to make sure that you are responding to an official document from the USPTO rather than a private company solicitation. All official USPTO correspondence will be mailed only from the "United States Patent and Trademark Office" in Alexandria, VA; or sent by e-mail from the domain "@uspto.gov." For more information on how to handle private company solicitations, see [http://www.uspto.gov/trademarks/solicitation\\_warnings.jsp](http://www.uspto.gov/trademarks/solicitation_warnings.jsp).





# EXHIBIT 30

---

**To:** Empire Distribution Inc. ([trademarks@troutmansanders.com](mailto:trademarks@troutmansanders.com))  
**Subject:** U.S. TRADEMARK APPLICATION NO. 86476822 - EMPIRE DISTRIBUTION - 247036.1 EMP  
**Sent:** 10/19/2015 7:58:47 PM  
**Sent As:** ECOM101@USPTO.GOV  
**Attachments:**

---

**UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)  
OFFICE ACTION (OFFICIAL LETTER) ABOUT APPLICANT'S TRADEMARK APPLICATION**

**U.S. APPLICATION SERIAL NO.** 86476822

**MARK:** EMPIRE DISTRIBUTION

**\*86476822\***

**CORRESPONDENT ADDRESS:**

Michael D. Hobbs, Jr., Esq.  
Troutman Sanders LLP  
600 Peachtree Street NE, Suite 5200  
Atlanta GA 30308

**GENERAL TRADEMARK  
INFORMATION:**

<http://www.uspto.gov/trademarks/index.jsp>

[VIEW YOUR APPLICATION FILE](#)

**APPLICANT:** Empire Distribution Inc.

**CORRESPONDENT'S REFERENCE/DOCKET NO :**

247036.1 EMP

**CORRESPONDENT E-MAIL ADDRESS:**

[trademarks@troutmansanders.com](mailto:trademarks@troutmansanders.com)

**SUSPENSION NOTICE: NO RESPONSE NEEDED**

**ISSUE/MAILING DATE:** 10/19/2015

This Office action is in response to applicant's communication filed on 5 October 2015.

The trademark examining attorney is suspending action on the application for the reason(s) stated below. *See* 37 C.F.R. §2.67; TMEP §§716 *et seq.*

**PENDING CIVIL PROCEEDING(S):** The pending civil proceeding(s) below pertains to (1) a registered mark that conflicts with applicant's mark under Trademark Act Section 2(d), (2) a mark in a pending application(s) that could conflict with applicant's mark under Section 2(d) if it registers, and/or (3) the registrability of applicant's mark. *See* 15 U.S.C. §1052; 37 C.F.R. §2.83; TMEP §§716.02(a), (c)-(d), 1208 *et seq.* Because the civil proceeding(s) pertains to an issue that could directly affect whether applicant's mark can be registered, action on this application is suspended pending termination of the civil proceeding(s). *See* 37 C.F.R. §2.67; TMEP §§716.02(a), (c)-(d).

- Cancellation No(s). re: U.S. Registration No. 3919554

**REFUSAL(S)/REQUIREMENT(S) CONTINUED AND MAINTAINED:** The following refusal(s)/requirement(s) is/are continued and maintained:

**Section 2(d) Refusal – With Respect to U.S. Registration No. 3919554 – MAINTAINED**

Pending the outcome of the above-referenced cancellation proceeding, the refusal under Section 2(d), citing U.S. Registration No. 3919554, is MAINTAINED.

**Section 2(d) Refusal – With Respect to U.S. Registration No. 3586140 – WITHDRAWN**

As U.S. Registration No. 3586140 has been cancelled, the refusal under Section 2(d) citing it is WITHDRAWN.

**Recitation of Services -- REPEATED**

The applicant's argument has been carefully considered. However, the examining attorney remains unpersuaded. Reference to a single registration that has been registered almost five years ago is insufficient to overcome the requirement for clarification of the applicant's recitation of services. Therefore, the requirement for clarification of the identification of services because it is too broad and could include services classified in other international classes is REPEATED. *See* TMEP §§1402.01, 1402.03. "Retail stores services and On-line retail store services featuring sound recordings, audio and audio-visual recordings, audio and audio-visual DVDs, and audio and audio-visual CD-ROMs" in Class 35; and/or "Delivery of digital music by electronic transmission, via wired and wireless networks including mobile phone and wireless device carriers, all of the above excluding the delivery of custom-created content to the customers that commissioned the creation of such content; Streaming of videos, video clips, films and film footage via a global computer network, all of the above excluding the delivery of custom-created content to the customers that commissioned the creation of such content; Virtual chat rooms established via text messaging pertaining to music, videos and films via wired and wireless networks including mobile phone and wireless device carriers, all of the above excluding the delivery of custom-created content to the customers that commissioned the creation of such content" in Class 38.

For assistance with identifying and classifying goods and services in trademark applications, please see the USPTO's online searchable *U.S. Acceptable Identification of Goods and Services Manual* at <http://tess2.uspto.gov/netathtml/tidm.html>. *See* TMEP §1402.04.

An applicant may only amend an identification to clarify or limit the services, but not to add to or broaden the scope of the services. 37 C.F.R. §2.71(a); *see* TMEP §§1402.06 *et seq.*, 1402.07.

**Classification**

The applicant must properly classify the amended services in the correct International Class(es). *See* 37 C.F.R. §§2.32(a)(7), 2.85; TMEP §§1401.02(a), 1401.03(b).

**Possible Multi-Class Application**

The application identifies goods and/or services that may be classified in more than 1 class; however, applicant submitted a fee sufficient for only 1 class. In a multiple-class application, a fee for each class is required. 37 C.F.R. §2.86(a)(2), (b)(2); TMEP §§810.01, 1403.01.

Therefore, applicant must either (1) restrict the application to the number of classes covered by the fees already paid, or (2) submit the fees for each additional class.



The fees for adding classes to a regular TEAS application are \$325 per class when the fee is paid using the Trademark Electronic Application System (TEAS) and \$375 per class when the fee is paid in a paper submission. *See* 37 C.F.R. §2.6(a)(1)(i)-(ii); TMEP §§810, 1403.02(c).

The application identifies goods and/or services in more than one international class; therefore, applicant must satisfy all the requirements below for each international class based on use in commerce under Section 1(a):

- (1) List the goods and/or services by their international class number in consecutive numerical order, starting with the lowest numbered class.
- (2) Submit a filing fee for each international class not covered by the fee(s) already paid (view the USPTO's current fee schedule at [http://www.uspto.gov/trademarks/tm\\_fee\\_info.jsp](http://www.uspto.gov/trademarks/tm_fee_info.jsp)). The application identifies goods and/or services that may be classified in more than one class; however, applicant submitted a fee sufficient for only 1 class. Applicant must either submit the filing fees for the classes not covered by the submitted fees or restrict the application to the number of classes covered by the fees already paid.
- (3) Submit verified dates of first use of the mark anywhere and in commerce **for each international class**.
- (4) Submit a specimen for each international class. The current specimen is acceptable for class 38; and applicant needs a specimen for any additional class(es).

Examples of specimens for goods include tags, labels, instruction manuals, containers, and photographs that show the mark on the actual goods or packaging, or displays associated with the actual goods at their point of sale. Webpages may also be specimens for goods when they include a picture or textual description of the goods associated with the mark and the means to order the goods.

Examples of specimens for services include advertising and marketing materials, brochures, photographs of business signage and billboards, and website printouts that show the mark used in the actual sale, rendering, or advertising of the services.

- (5) Submit a verified statement that **"The specimen was in use in commerce on or in connection with the goods and/or services listed in the application at least as early as the filing date of the application."**

*See* 15 U.S.C. §§1051(a), 1112; 37 C.F.R. §§ 2.32(a)(6)-(7), 2.34(a)(1), 2.86(a); TMEP §§904, 1403.01, 1403.02(c).

For an overview of the requirements for a Section 1(a) multiple-class application and how to satisfy the requirements online using the Trademark Electronic Application System (TEAS) form, please go to <http://www.uspto.gov/trademarks/law/multiclass.jsp>.

The USPTO will periodically conduct a status check of the application to determine whether suspension remains appropriate, and the trademark examining attorney will issue as needed an inquiry letter to applicant regarding the status of the matter on which suspension is based. TMEP §§716.04, 716.05. Applicant will be notified when suspension is no longer appropriate. *See* TMEP §716.04.

No response to this notice is necessary; however, if applicant wants to respond, applicant should use the "Response to Suspension Inquiry or Letter of Suspension" form online at <http://teasroa.uspto.gov/rsi/rsi>.

If applicant has questions regarding this Office action, please telephone or e-mail the assigned trademark examining attorney. All relevant e-mail communications will be placed in the official application record; however, an e-mail communication will not be accepted as a response to this Office action and will not extend the deadline for filing a proper response. *See* 37 C.F.R. §§2.62(c), 2.191; TMEP §§304.01-.02, 709.04-.05. Further, although the trademark examining attorney may provide additional explanation pertaining to the refusal(s) and/or requirement(s) in this Office action, the trademark examining attorney may not provide legal advice or statements about applicant's rights. *See* TMEP §§705.02, 709.06.

/Katherine Stoides/  
Examining Attorney  
Law Office 101  
571-272-9230  
[katherine.stoides@uspto.gov](mailto:katherine.stoides@uspto.gov) (unofficial use only)

**PERIODICALLY CHECK THE STATUS OF THE APPLICATION:** To ensure that applicant does not miss crucial deadlines or official notices, check the status of the application every three to four months using the Trademark Status and Document Retrieval (TSDR) system at <http://tsdr.uspto.gov/>. Please keep a copy of the TSDR status screen. If the status shows no change for more than six months, contact the Trademark Assistance Center by e-mail at [TrademarkAssistanceCenter@uspto.gov](mailto:TrademarkAssistanceCenter@uspto.gov) or call 1-800-786-9199. For more information on checking status, see <http://www.uspto.gov/trademarks/process/status/>.

**TO UPDATE CORRESPONDENCE/E-MAIL ADDRESS:** Use the Trademark Electronic Application System (TEAS) form at <http://www.uspto.gov/trademarks/teas/correspondence.jsp>.



---

**To:** Empire Distribution Inc. ([trademarks@troutmansanders.com](mailto:trademarks@troutmansanders.com))  
**Subject:** U.S. TRADEMARK APPLICATION NO. 86476822 - EMPIRE DISTRIBUTION - 247036.1 EMP  
**Sent:** 10/19/2015 7:58:48 PM  
**Sent As:** ECOM101@USPTO.GOV  
**Attachments:**

---

**UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)**

**IMPORTANT NOTICE REGARDING YOUR  
U.S. TRADEMARK APPLICATION**

USPTO OFFICE ACTION (OFFICIAL LETTER) HAS ISSUED  
ON **10/19/2015** FOR U.S. APPLICATION SERIAL NO.86476822

Please follow the instructions below:

**(1) TO READ THE LETTER:** Click on this link or go to <http://tsdr.uspto.gov/>, enter the U.S. application serial number, and click on "Documents."

The Office action may not be immediately viewable, to allow for necessary system updates of the application, but will be available within 24 hours of this e-mail notification.

**(2) QUESTIONS:** For questions about the contents of the Office action itself, please contact the assigned trademark examining attorney. For *technical* assistance in accessing or viewing the Office action in the Trademark Status and Document Retrieval (TSDR) system, please e-mail [TSDR@uspto.gov](mailto:TSDR@uspto.gov).

**WARNING**

**PRIVATE COMPANY SOLICITATIONS REGARDING YOUR APPLICATION:** Private companies **not** associated with the USPTO are using information provided in trademark applications to mail or e-mail trademark-related solicitations. These companies often use names that closely resemble the USPTO and their solicitations may look like an official government document. Many solicitations require that you pay "fees."

Please carefully review all correspondence you receive regarding this application to make sure that you are responding to an official document from the USPTO rather than a private company solicitation. All official USPTO correspondence will be mailed only from the "United States Patent and Trademark Office" in Alexandria, VA; or sent by e-mail from the domain "@uspto.gov." For more information on how to handle private company solicitations, see



[http://www.uspto.gov/trademarks/solicitation\\_warnings.jsp](http://www.uspto.gov/trademarks/solicitation_warnings.jsp).

# **EXHIBIT 31**

**FILED SEPARATELY UNDER SEAL  
PURSUANT TO L.R. 79-5.2.2**

# **EXHIBIT 32**

**FILED SEPARATELY UNDER SEAL  
PURSUANT TO L.R. 79-5.2.2**

# **EXHIBIT 33**

**FILED SEPARATELY UNDER SEAL  
PURSUANT TO L.R. 79-5.2.2**